

I. Termination Under the Common Law.

1. Contract Claims.

Vermont is an at will employment state. This means that an employee may be discharged at any time for any reason or no reason at all. Taylor v. Nat'l Life Ins. Co., 161 Vt. 457 (1993). However, where an employer promulgates employment manuals that are inconsistent with an at-will employment relationship, an implied contract arises. Ross v. Times Mirror, Inc., 164 Vt. 13 (1995). An employment inconsistent with an at-will relationship contract may also arise from verbal promises made to an employee at the time of hiring or subsequent to hiring or established employment practices.

To be binding and enforceable, the promise must be definitive, communicated to the employees and demonstrate an objective manifestation of the employer's intent to bind itself. Policies do not have to be in writing to be enforceable. Even an unwritten policy or practice may be enforceable if it is clearly established and uniformly and consistently applied. However, vague statements are not sufficient to create a binding promise. For example, telling an employee that the employer would "probably" talk to the employer before taking disciplinary action is not enforceable. Likewise, where the employer indicates that it generally renews performance appraisals before taking action is not a legally required practice. Where the employer specifies certain procedures to be followed in connection with employee discipline, those procedures will be binding. Conflicting policies or practices, written or unwritten, create an ambiguity in the contract of employment. That ambiguity must be resolved by a jury.

Vermont also implies a covenant of good faith and fair dealing in connection with any contract. A modified at-will relationship will likely be held to contain such an implied

obligation on the part of the employer. Accordingly, if there is evidence that the employer acted in bad faith, it may provide a basis for liability. For example, if the employer created circumstances intended to support the termination, there will likely be bad faith conduct supporting a breach of contract claim.

There is also a public policy component to each employment contract. Vermont law does not permit an employer to terminate an employee for reasons that violate the public interest. It is not clear exactly what those interests are, but the Court has provided some general guidance. Firing someone because she refuses to violate a safety statute likely will be a violation of public policy. One case found that discharging a doctor who refused to violate AMA ethical guidelines would probably violate public policy.

2. Promissory Estoppel.

If a clear and definite promise is made to a single employee, in writing or verbally, it may support a contract claim. If certain representations are made before an employment contract is formed, and those representations are reasonably relied upon by the employee in accepting employment or remaining with the employer, the employer is bound to those pre-employment promises.

3. Just Cause.

Where the employer has bound itself to discharge only where there is just or good cause, the courts have imposed a significant burden. Just cause has two elements: (1) it was reasonable to discharge the employee given her conduct; and (2) the employee had fair notice that the conduct would lead to discharge. In a recent decision, the Vermont Supreme Court suggested that the employer must act in

“objective good faith.” This standard may indicate that the employer need only prove that it reasonably believed the employee engaged in conduct warranting dismissal. Some courts have held a jury must decide whether the conduct supported termination.

II. Due Process Consideration.

The courts have long held that public employees may have an interest in their continued employment which rises to the level of a property interest so as to trigger the protection of constitutional procedural due process. Due process property interest claims follow a three-part analysis. First, the public employee must possess a property interest in continued employment. Second, the public employee must demonstrate that there has been a deprivation of her property interest effected by the public employer. Third, it is the claimant’s burden to show that the deprivation was made without the process of law. Such claims are brought under 42 U.S.C. § 1983.

1. When is There a Property Interest?

There must be either rules or explicit understandings supporting an employee’s claim of entitlement so as to trigger a property interest. If the employee is at-will, there is no property interest. However, if there is some indication that the employee can only be dismissed for just cause or under certain circumstances, the courts may determine that she is entitled to due process. Both verbal and written promises may give rise to a property interest.

2. What is a Deprivation?

A termination, suspension, demotion or transfer or reduced pay all amount to a deprivation. A denial of certain benefits, like a promotion, pension or a particular job assignment are also deprivations.

Not every adverse employment action amounts to a deprivation. For example, an employee may be issued a written warning and letter of reprimand. Several courts have held that the issuance of a warning letter was not of sufficient magnitude to implicate the plaintiffs' property interest in his continued employment.

3. How Much Process is Due?

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), established that in all cases where an employee has a protected property interest, he or she is entitled to pretermination due process.

Loudermill suggests that due process is an elastic concept, depending upon the discipline to be imposed and the nature of the alleged offense. For example, a suspension requires less due process than termination. In termination, due process can be satisfied only by providing both pre- and post-termination hearings. The pre-termination hearing must include notice of the criticisms of the employee and an opportunity to respond, even where there are post-termination procedures that fully compensate a wrongfully terminated employee. Hence, if you wish to discharge one of your employees, you must give notice of the charges against the employee, explain your evidence against him or her, and provide him or her with an opportunity to present his or her side of the story.

After termination, the employee is guaranteed a full evidentiary hearing in which the employee may present evidence and cross examine adverse witnesses. Further, there must be some assurance that the person hearing the matter will decide the case in an unbiased manner. Loudermill also suggests that if the employee wishes, he or she must be permitted legal counsel to represent him or her at the hearing. At the hearing, the employee bears the burden of proving that he or she should not have been dismissed.

In cases involving suspensions, the standards are somewhat lower. The employee must be provided with an opportunity to hear the charges against him or her and an opportunity to respond to those charges. The circumstances must be fair. The employer must keep in mind that the greater intended discipline, the more stringent due process constraints will be placed upon it.

Failure to adhere to due process in connection with discipline or discharge supports a § 1983 claim as discussed above, the danger of §1983 claims is an entitlement to attorney's fees where there is any recovery.

III. Loss Prevention.

1. Handbook Reviews.

It is important that where there are handbooks that they are internally consistent and do not bind you as a matter of law to positions you did not intend. We recommend that you provide the handbooks to counsel for a comprehensive review. It is also important that the handbooks contain all of the federally and state required information.

We also recommend training on handbooks and performance evaluations to all supervisors who participate in employee discipline and terminations. The vast majority of wrongful discharge claims arise from minor departures from progressive discipline

policies. It is critical that each supervisor be made aware of their respective responsibilities in connection with internal policies and procedures. To the extent that there are statutes which will govern their treatment of employees, controlling dates and substantive responsibilities should be discussed. We recommend that if you desire a good cause standard, there ought to be specified procedures for termination. The time to consider procedures is before, not after, the decision to discharge has been made.

2. Evaluations.

All employee evaluations must accurately reflect their level of performance. Employers usually are much more critical to the employee in documents that the employee has not seen or to others. The employee must be made aware of his or her perceived shortcomings. The evaluations will likely be a trial exhibit should the matter go into litigation.

3. Arbitration Agreement.

Employers may require employees to sign an agreement to arbitrate any potential employment dispute. Arbitration is a private alternative means of dispute resolution. It is usually more expeditious and less expensive. It also guarantees results which usually are more predictable than jury verdicts.

4. Resignation.

Employers can often structure circumstances so that a problem employee chooses to resign instead of being fired or disciplined. It is far more difficult to prevail in a constructive discharge claim than in a breach of contract claim.

VI. Discipline Check List.

We recommend the following steps in connection with disciplinary action against public employees. There will obviously be circumstances which warrant a departure from the steps. The check list should only serve as a rough guide in connection with employee discipline.

- Review provisions of policies and procedures manual which might be controlling.
- Investigate allegations against employee. Your investigation may include collecting documents, interviewing witnesses and examining physical evidence. The employer should create a record which reflects the steps taken to investigate.
- Meet with the employee who may be subject to discipline. Where appropriate, include a witness. Explain the allegations and evidence against the employee and ask the employee to respond verbally or in writing or both to those allegations.
- If necessary, further investigate the information provided by the employee.
- Consult with counsel to determine if due process requirements exist and, if so, whether they have been met. Discuss any possible statutory constraints on your action with the attorney.
- Review all of the applicable policies and procedures for a second time.
- Consider all of the evidence you have discovered.

- Make a determination as to appropriate action. Provide immediate written notification of your decision to the employee. The employee should acknowledge in writing receipt of the notification.